

Commission, State of Ha
H. H. Gosc.

In the Matter of the Application of)
)
KRWCC CORPORATION, dba KOHALA RANCH)
WATER COMPANY)
)
For Review and Approval of Rate)
Increases and Revised Rate)
Schedules.)
)

Order No. 22983

By this Order, the commission denies Palila Growers, LLC's ("Palila") motion for an enlargement of time to file a motion to intervene, and thus dismisses Palila's motion to intervene, in the matter of KRWC CORPORATION, dba KOHALA RANCH WATER COMPANY's ("KRWC") application for review and approval of rate increases and revised rate schedules.

On January 5, 2006, KRWC filed an application for commission approval of rate increases and revised rate schedules and rules, pursuant to Hawaii Revised Statutes ("HRS") § 269-16 ("Application").¹ On March 8, 2006, the commission held a public hearing, pursuant to HRS § 269-16(f)(2), at the Waimea Civic

¹KRWC served a copy of its Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to all commission proceedings, pursuant to HRS § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62.

Center in Kamuela, Hawaii, to take public comments on KRWC's Application ("Public Hearing").

Following the Public Hearing, within the time frame specified by HAR § 6-61-57(1),² motions to intervene were filed by Carolyn Pomeroy on March 15, 2006, Kohala By the Sea Association ("KBTS") on March 17, 2006, Andrew Czajkowski on March 17, 2006, and Melanie Biddle on March 20, 2006. By Order No. 22454, the commission denied the motions to intervene filed by KBTS, Carolyn Pomeroy, Andrew Czajkowski, and Melanie Biddle, and granted KBTS participation without intervention, limited to the filing of written testimonies relating to the issue of the "Firewise" safety program.³

By Stipulated Procedural Order No. 22353, filed on March 24, 2006, the commission approved the regulatory schedule for this proceeding. The schedule provided for submission of information requests ("IRs"), responses to IRs, submission of supplemental IRs and responses to the supplemental IRs. In addition, it provided for the submission of direct and rebuttal testimonies.⁴

²Pursuant to HAR § 6-61-57(1), a timely motion to intervene in this docket must have been filed "not later than ten days after the last public hearing held pursuant to the published notice of the hearing," i.e., by March 20, 2006.

³On May 19, 2006, KBTS filed motions for reconsideration or clarification of Order No. 22454 and for stay, arguing that full intervention status should have been granted to KBTS. KBTS' motion for reconsideration was denied and its motion for stay dismissed as moot by Order No. 22530, filed on June 13, 2006. The Consumer Advocate and KRWC are collectively referred to as the "Parties" and KBTS is referred to as the "Participant."

⁴By letter dated May 31, 2006, the Parties requested to amend the regulatory schedule that was approved by

On September 6, 2006, the Parties submitted a Stipulated Interim Relief Letter in Lieu of Evidentiary Hearing, as amended on September 14, 2006 ("Stipulated Interim Relief Letter") in which they agree that "KRWC is probably entitled to an increase in its rates to the extent provided herein," and that "without interim relief in this proceeding, KRWC may be denied an opportunity to earn a fair return on its rate base."⁵ As a result, they agree that "based on the probable entitlement standard for the establishment of interim rates, KRWC would be entitled to an interim increase in revenues of \$572,314 (\$1,522,255 - \$949,941), or 60.25 percent ($\$572,314 \div \$949,941$) over revenues at present rates."⁶

A.

Palila's Motion

On September 29, 2006, Palila filed a Motion for Enlargement of Time to Intervene and Motion to Intervene of Palila Growers, LLC ("Motion"). In support of its Motion, Palila states that it did not intervene earlier because: (1) it relied "on continual expressions [by KRWC] . . . that it would be taken care of in the form of a lower rate applicable to agricultural

Order No. 22353, filed on March 24, 2006, to provide the Consumer Advocate with additional time to file its direct testimonies. By Order No. 22534, filed on June 15, 2006, the commission approved the Parties' request to extend the deadline and determined that the Parties' failure to strictly comply with the procedural schedule extended the deadline by which the commission must render a decision on KRWC's Application from six months to nine months.

⁵See Stipulated Interim Relief Letter at 4.

⁶Id. at 5.

operations,"⁷ and thus, saw no need for intervening at that time; (2) that it was "lulled . . . into relying upon [KRWC's] Public Hearing presentation, cooperating with [KRWC's] expressed intentions, and refraining from exercising its rights to intervene"⁸; and that (3) "upon learning that there were no [agricultural rates] . . . sought the instant motions."⁹

Palila alleges that it relied upon assurances given by the President of KRWC prior to the public hearing that: (1) "he was mindful of the needs of Palila Growers LLC and that they would be providing an agricultural water rate for [Palila]"¹⁰; (2) he would arrange for Palila to get larger meters so that Palila would be eligible for a more favorable water rate under a proposed KRWC rate structure; and (3) KRWC's President and Vice-President "continually confirmed their plan to accommodate [Palila's] need for a favorable agricultural water rate."¹¹

Palila contends that its "first knowledge of the agreement reached by KRWC [and the Consumer Advocate] was KRWC's undated letter mailed to KRWC customers after the agreement was reached on September 6, 2006"¹² and that "at the end of the day, the totality of circumstances support the reasonable conclusion:

⁷Motion for Enlargement of Time at 3.

⁸Id. at 3, n.3.

⁹Id. at 3.

¹⁰Id. at 4.

¹¹Id.

¹²Motion at 5.

KRWC, however well intentioned or unwittingly, lulled [Palila] into resting on its right to timely move for intervention."¹³

B.

Memoranda in Opposition to Palila's Motion

1.

KRWC

On October 6, 2006, KRWC and the Consumer Advocate filed separate memoranda in opposition to Palila's Motion.¹⁴ In its Memorandum in Opposition to Palila Grower LLC's Motion for Enlargement of Time to Intervene and Motion to Intervene ("KRWC's Memorandum in Opposition"), KRWC states, in general, that (1) "the facts and circumstances articulated by Palila in [its] Motion to Enlarge Time do not rise to the level of excusable neglect . . .",¹⁵ set forth in HAR § 6-61-23(a)(2), and (2) "enlarging the time period to over six months is excessive and unreasonable"¹⁶ and would be prejudicial to other applicants and parties in the instant and future proceedings.

¹³Id. at 6.

¹⁴On October 12, 2006, Palila filed a Reply to Memoranda of KRWC Corporation and Division of Consumer Advocacy in Opposition to Motion for Enlargement of Time to Intervene and Motion to Intervene ("Reply"). The commission notes that its rules do not allow for replies, and Palila failed to request leave to file a reply. As such, the commission will not consider Palila's Reply. See HAR § 6-61-41. Compare HAR § 6-61-140 (providing that the "commission **may** allow replies to a motion for rehearing or reconsideration or a stay") (emphasis added).

¹⁵KRWC's Memorandum in Opposition at 4.

¹⁶Id. at 11.

KRWC argues that "there is no reasonable and credible basis for [Palila] to conclude that KRWC's actions precluded [Palila] from freely exercising its right to intervene in this proceeding."¹⁷ KRWC contends that Palila's reliance on alleged representations by KRWC was misplaced in that: (1) KRWC did not make "any representations and/or assurances to Palila that it would be taken care of in the form of a lower rate applicable to agricultural operations in this proceeding"¹⁸; (2) the commission's Notice of Public Hearing¹⁹ states, in relevant part, that "the increase in rates and charges to be finally approved by the [c]ommission, if any, may be higher or lower than KRWC's proposed rates"²⁰; (3) the Notice of Public Hearing included the caveat that the deadline for submitting motions to intervene was March 20, 2006; (4) four (4) other movants timely moved the commission for intervenor status in this docket; (5) at the close of the Public Hearing, the commission "duly informed everyone in attendance that if anyone seeks to intervene in this proceeding" it must be done by March 20, 2006²¹; and (6) "consistent with the oral and written communications made by KRWC to its ratepayers during this proceeding," Palila "should have known prior to the

¹⁷Id. at 7.

¹⁸Id. at 6 (internal footnotes omitted).

¹⁹The commission's Notice of Public Hearing invited all interested persons to attend the public hearing and set forth their views and concerns with regard to KRWC's General Rate Case Application. The Public Hearing was held on March 8, 2006, in Kamuela, Hawaii.

²⁰KRWC's Memorandum in Opposition at 5.

²¹KRWC's Memorandum in Opposition at 8.

March 20, 2006 intervention deadline that KRWC's proposals may be subject to further modifications by either the Consumer Advocate and/or ultimately by the [c]ommission."²²

2.

Consumer Advocate

On October 6, 2006, the Consumer Advocate filed its Memorandum in Opposition to Motion for Enlargement of Time to Intervene and Motion to Intervene of Palila Growers, LLC ("Consumer Advocate's Memorandum in Opposition") stating that it opposed the motion for enlargement of time because Palila's failure to file a timely motion to intervene is not due to excusable neglect, the standard set forth in HAR § 6-61-23(a)(2). The Consumer Advocate maintains that: (1) Palila's decision not to file a motion for intervention within the prescribed period was made knowingly; (2) Palila's claim that it was "lulled" into inaction does not constitute excusable neglect; and (3) Palila's assertion that it could not have reasonably expected KRWC to agree to rates higher than those noted in the Notice of Public Hearing does not rise to the level of excusable neglect.

The Consumer Advocate states that Palila's failure to file a timely motion to intervene is the result of Palila's "own decision to not make such filing,"²³ not circumstances beyond Palila's control and cites a number of prior commission cases

²²Id. at 9.

²³Consumer Advocate's Memorandum in Opposition at 6.

illustrating the strict standard applicable to a showing of excusable neglect.²⁴

II.

Discussion

HAR § 6-61-57(1) states, in relevant part:

A motion to intervene or participate in a public utility rate increase case shall be filed not later than ten days after the last public hearing held pursuant to the published notice of the hearing. The date for filing a timely motion to intervene shall be indicated in the published notice of public hearing. The movant shall serve its motion on the applicant and consumer advocate before filing it with the commission and shall file with the commission a proof of that service;

HAR § 6-61-57(1). The Public Hearing in this proceeding was held on March 8, 2006. Accordingly, since March 18, 2006, was a Saturday, the deadline to file motions to intervene in this docket was March 20, 2006.

Recognizing that a motion to intervene would now be untimely, Palila has moved for an enlargement of time to file its motion to intervene, pursuant to HAR § 6-61-23(a)(2). It states:

Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action on jurisdictional.

HAR § 6-61-23(a)(2). Thus, the commission may allow Palila leave to file a motion to intervene only upon a showing of "excusable neglect." The excusable neglect standard is a strict standard

²⁴See Consumer Advocate's Memorandum in Opposition at 5-6; see, e.g., In re Puuwaawaa Waterworks, Inc., Docket No. 03-0369, Order No. 21021 (June 2, 2004) (finding that an underestimation of the time it takes for mail delivery does not rise to the level of excusable neglect).

requiring a showing that the failure to timely file with the commission was due to circumstances beyond Palila's control.²⁵ Lack of legal sophistication and ignorance of the law do not constitute excusable neglect. Pogia v. Ramos, 10 Haw. App. 411, 416, 876 P.2d 1342 (Haw. Ct. App. 1994).

Here, Palila argues that "KRWC however well intentioned or unwittingly, lulled [Palila] into resting on its right to timely move for intervention."²⁶ Palila, however, cites no legal basis to support its argument that "unwittingly" lulling a customer into foregoing its right to move for intervention is a basis for a finding of "excusable neglect" under HAR § 6-61-23(a)(2). In addition, the commission is not persuaded

²⁵In re Public Utilities Commission, Docket No. 05-0195, Order No. 22040 (Sept. 21, 2005). See also Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001); Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 350, 910 P.2d 116, 121 (1996) (noting that the excusable neglect standard was a "strict standard, requiring a showing that the failure to timely file a notice of appeal was due to circumstances beyond the appellant's control"); In re Aikane Interpacific Corp., dba Maika'i Ohana Tours, Docket No. 05-0095, Order No. 21893 (June 24, 2005) (finding that the moving party's assertion that it was delayed in securing legal representation did not rise to the level of excusable neglect); In re Hawaii Water Service Co., Inc., Docket No. 03-0275, Order No. 21059 (June 17, 2004) (finding that docket deadlines, departure of the supervising attorney, sick leave requests and scheduling commitments did not constitute excusable neglect); In re Puuwaawaa Waterworks, Inc., Docket No. 03-0369, Order No. 21021 (June 2, 2004) (finding that an underestimation of the time it takes for a mail delivery did not rise to the level of excusable neglect); In re Soltur, Inc., Docket No. 00-0063, Order No. 18114 (October 4, 2000) (denying a motion for the enlargement of time based on excusable neglect where the movant claimed that its failure to act was due to the substitution of counsel); In re Laie Water Co., Inc., Docket No. 00-0017, Order No. 17942 (August 2, 2000) (stating that ignorance of the rules governing the practice and procedure before the commission, or mistakes construing such rules, do not constitute excusable neglect).

²⁶Id. at 6.

that KRWC caused Palila to forego its right to file a motion for intervention. Notwithstanding any initial reliance by Palila on alleged representations by KRWC that it would provide a special rate for agricultural users, Palila was aware that KRWC had not requested an agricultural rate in its Application and could have taken steps early on to ensure that its position in the instant case would be heard and considered. The commission is not convinced that Palila's decision to forego filing a motion for intervention was due to circumstances beyond its control. Instead, Palila's decision not to intervene appears to have been deliberate and calculated, and was made despite notice by the commission in its Notice of Public Hearing that "the increase in rates and charges to be finally approved by the [c]ommission, if any, may be higher or lower than KRWC's proposed rates."²⁷

Of particular concern to the commission is the length of time that has passed since the intervention deadline. The Parties have already conducted discovery and reached a settlement for interim relief purposes. To further delay this proceeding, which was initially intended to be completed within six months, would be unduly prejudicial to the utility given the inordinate amount of time that has passed and the stage of the current proceeding. Accordingly, the commission finds that Palila's motion for enlargement of time should be denied.

As the commission is denying the motion for enlargement of time, Palila's motion to intervene is moot. Accordingly, the

²⁷KRWC's Memorandum in Opposition at 5.

commission concludes that Palila's motion to intervene should also be dismissed as moot.

IV.

Orders

THE COMMISSION ORDERS:

1. Palila's motion for enlargement of time, filed on September 29, 2006, is denied.
2. Palila's motion to intervene, filed on September 29, 2006, is dismissed as moot.

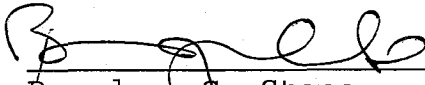
DONE at Honolulu, Hawaii OCT 27 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

05-0334.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22983 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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